No. 14398

United States Court of Appeals

For the Ninth Circuit

PETER DESIMONE, JOHN STEPICH, HAROLD HOPKINS,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

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INDEX

	Page
Jurisdiction	1
Statement of the Case	3
Specification of Errors	12
Argument	17
1. The evidence does not prove beyond a reasonable doubt that the Defendants agreed to violate Title 26, Section 3253, U.S.C., and there is no evidence of a specific design plan or purpose on the part of the Defendants to violate Section 3253	17
2. The special findings of fact entered by the trial court do not support the judgment and sentence. There is no finding of an existing agreement between any of the alleged conspirators. There is no finding as to when the conspiracy originated nor as to who the original parties to it were. There is no finding when the other Defendants joined the conspiracy nor is there any finding of the existence of the conspiracy to be joined. The trial court erred in failing to make the special findings requested by the Defendants in accordance with Rule 23 (c) of Federal Rules of Criminal Procedure	28
3. Plaintiff's Exhibits 2, 4 and 5 should not have been admitted because no proper foundation was laid for their admission. The failure of proof showing that the signatures affixed to the documents admitted were those of the Defendants named rendered the exhibits incompetent. Their admission was particularly prejudicial to the Defendants, Stepich and Hopkins, in that these exhibits constitute the only link connecting these Defendants with the White Center Athletic Club at the period specified in the indictment as the date of origin of the conspiracy	31
A. No proper foundation was laid for the admission of Exhibit 2 (application for certificate of registration and bi-monthly state excise tax returns filed with the Washington State Commission). There is no evidence identifying the signature contained on the exhibit as being those of any of the appellants	31

Page

B. Plaintiff's Exhibits 4 and 5 should not have been admitted because the government failed to establish the identity of the purported signatures and failed to establish that the persons signing the exhibits had authority to execute the same 33

4. The indictment is ambiguous and uncertain and not in the language of the statute defining the offense. It charges a non-existing crime and fails to charge properly the crime sought to be defined. For these reasons Defendants' motion to dismiss should have been granted 37

Conclusion 38

TABLES OF CASES

Davidson, et al., v. United States, 61 F.(2d) 250 22

Derby Club, et al., v. Becket, 41 Wn.(2d) 869, 252 P. (2d) 259 21

Levey v. United States, 92 F.(2d) 688 35

Masterson v. Pa. R. Co., 182 F.(2d) 793 35

State v. Frost, 105 Conn. 326, 135 Atl. 446 30

United States v. Di Re, 159 F.(2d) 818 25

United States v. Falcone, 109 F.(2d) 579, affd. 311 U.S. 205 24

Wolcher v. United States, 200 F.(2d) 493 36

TEXTBOOKS

Federal Rules of Criminal Procedure for the District Courts of the United States, West Publishing Co., 1946 (pp. 33-37) 29

STATUTES

Title 18, U.S.C., Section 371 1

Title 26, U.S.C., Section 3253 ..... 1, 18, 21, 37, 38

Title 26, U.S.C., Section 3250 (b) 4

Title 26, U.S.C., Section 1753 17

Title 28, U.S.C., Section 1732 ..... 12, 33

Title 28, U.S.C., Section 1733 ..... 12, 33

RULES OF PROCEDURE

Page

Federal Rules of Criminal Procedure 23 (c) 28
Federal Rules of Criminal Procedure 37 5
Federal Rules of Criminal Procedure 39 5
Federal Rules of Criminal Procedure 27 12
Federal Rules of Civil Procedure 44 34

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

JURISDICTION

The Grand Jury for the Western District of Washington, Northern Division, returned an indictment consisting of one count charging the appellants, Peter Desimone, John Stepich, Harold Hopkins, as well as one Russell W. Felton and one Bert DePierris with conspiracy (Title 18, U.S.C. Section 371) to violate the provisions of Title 26, U.S.C. Section 3253 rendering it illegal to carry on the business of retail liquor dealer and wilfully failing to pay a special tax required by law (R. 3). The indictment alleges that in furtherance of the conspiracy the defendants, using the name of White Center Athletic Club of which they were officers, took over a building and equipped the premises as a place for the sale of liquor at retail; that the defendants at various

[*Italics, wherever used in this brief, are ours*]

times between June 30, 1951, and May 8, 1952, stored liquor at the premises, and that the defendants, Felton and DePierris, sold whiskey by the glass (R. 4, 5). The defendants entered a plea of not guilty to the indictment. By stipulation (R. 10) all defendants waived trial by jury and the case was tried to the court. Prior to the trial, the defendants interposed a motion for the dismissal of the indictment (R. 11) on the ground that the same is vague, indefinite, and uncertain and ambiguous, and related to a nonexistent offense (R. 11, 12). The court denied the motion (R. 56).

At the conclusion of the government's case, the defendants moved to dismiss the indictment on the ground of insufficiency of the evidence (R. 222-232). The court denied the motion (R. 233). At the conclusion of the trial, defendants renewed their motion to dismiss the indictment on the ground of ambiguity (R. 336) and renewed their motion for acquittal on the ground of insufficiency of the evidence (R. 337). These motions were denied (R. 337).

After trial, counsel for defendants requested special Findings of Fact pursuant to Rule 23(c) of Federal Rules of Criminal Procedure (R. 14, 15). The court entered the General and Special Findings (R. 20-26) submitted by the United States District Attorney, and rejected those proposed by the defendants (R. 16-20). After trial the court rendered a memorandum decision (R. 337-340) finding all defendants guilty of the crime charged in the indictment and deciding that the government had proved all the overt acts charged, except the fifth one (R. 340).

The court subsequently sentenced all of the defendants as follows:

1. Peter Desimone to 18 months at McNeil Island (R. 369);
2. John Stepich to 15 days in the County Jail and a fine of $1,500.00 (R 370);
3. Harold Hopkins to 15 days in the County Jail and a fine of $1,200.00 (R. 370);
4. Russell W. Felton to 30 days in the County Jail suspended on probation for one year (R. 370);
5. Bert DePierris to 60 days in the County Jail suspended on probation for two years (R. 371).

After entry of judgment and sentence, the defendants, Peter Desimone, John Stepich and Harold Hopkins, gave timely notice of appeal (R. 37, 38, 45-47) in accordance with Rule 37 of Federal Rules of Criminal Procedure (Title 18, U.S.C.) and perfected the same in accordance with Rule 39 of Federal Rules of Criminal Procedure and the Rules of the Court of Appeals, Ninth Circuit.

STATEMENT OF THE CASE

In view of the fact that appellants' Statement of Points on which they intend to rely (R. 391, 392, 393—Points 2, 4, 5 and 6) relates to the insufficiency of the evidence to support the judgment and sentence, it will be necessary to set forth under this sub-heading the evidence in some detail.

The evidence shows that during the period covered by the indictment, the appellant, Peter Desimone, using the name White Center Athletic Club (R. 301, 302, 291), owned and operated certain premises consisting of a

quonset type structure (R. 88) fifty feet wide and 100 feet long (Dft. Ex. 1-A). Entering from the street, there was a lobby on the right side and an office and cloak room on the left. The main room consisted of a bar, and on the right wall there were numerous slot machines. The rest of the room was filled with tables and chairs where patrons would dine. On the back of the premises, there was a kitchen. The establishment was conducted mainly as a so-called bottle club (R. 125, 288, 309, 323) open only to members, who brought their own liquor which would be kept by the club to be dispensed by the bartenders for a service charge. The evidence shows that non-members had access to the premises and purchased liquor by the drink (R. 90-98, 114, 162, 185, 260, 266). During the period in question, the premises were raided repeatedly by officers of the Washington State Liquor Board and Deputy Sheriffs (R. 122-139; 144-149; 151-157). On the occasions of these raids, the defendants, Russell W. Felton (R. 122, 125, 136, 140) and Bert DePierris (R. 129, 136, 139), were found to have acted as bartenders, and the evidence establishes that on several occasions they sold liquor by the drink (R. 90, 91, 95, 96, 97, 264).

The chief of the Returns Processing Branch of the Internal Revenue Service of the Treasury Department of the United States for the District testified that the White Center Athletic Club did not have a Federal Retail Liquor Stamp for the period covered by the indictment (R. 83); that none of the defendants indicted had such a stamp; and that no application for such a stamp had been made by the club or any of the defendants and that the Federal Retail Liquor License Tax

($50.00 per annum—Title 26 U.S.C. Section 3250 (b) (1)) had not been paid by the club or any of the defendants (R. 83, 84).

The precise question involved on this appeal is whether the evidence establishes beyond a reasonable doubt the existence of a conspiracy between the defendants not to pay the $50.00 occupation tax. Appellants therefore deem it necessary to set forth the pertinent evidence insofar as it might connect the *individual defendants* named or other persons with such a conspiracy.

With reference to Peter Desimone, the testimony shows the following:

1. He did not take the stand. Throughout the whole period involved he occupied the premises, and on occasion personally tended bar (R. 131, 147). He hired one Charlotte Fulford (R. 306) who worked on the premises during the whole period covered by the indictment. She helped in the office (R. 308), she provided change for patrons of the slot machines, she checked the clothes of patrons and their liquor (R. 308), she paid the bills and the employees in the absence of Mr. Desimone and had the combination to the office safe (R. 318). She also made out payroll sheets and received a salary of $8.00 per day while working for the defendant, Desimone (R. 320). She never sold liquor herself (R. 322) but knew that liquor was being sold on the premises. Mr. Desimone hired and fired all help (R. 307, 306). Mr. Desimone was regarded as the owner of the club by his meat and produce supplier (R. 300-302). On February 4, 1952, upon a raid conducted by the Wash-

ington State Liquor Department, one of the inspectors inquired of him whether he had a Federal Retail Liquor Stamp and he admitted not having one (R. 134, 147).

2. With reference to Charlotte Fulford, the evidence establishes that she was an employee of the defendant Desimone (R. 306) during the period covered by the indictment. She was called as a witness for the defendants. With reference to the defendants, Hopkins and Stepich, she denied that either was employed by the club or had any business connection therewith (R. 307, 329). With reference to the defendant, Hopkins, she testified that his only connection with the club was as a member of the Lions Club. He would attend Monday night dinner meetings on the premises (R. 307). She testified that the only agreement she had with Mr. Desimone related to her employment (R. 320) ; that she never discussed with Mr. Desimone the question of presence or absence of Federal Retail Liquor Stamp (R. 320). She admitted that she overheard the discussion between the defendant, Desimone, and Washington State Liquor Board agents concerning such a stamp, and that the defendant, Desimone, told the officers that he didn't need a stamp because he was merely selling service (R. 321-322).

3. With reference to the defendant, John Stepich, the record shows the following: He did not testify at the trial. During the period covered by the indictment he was engaged as an insurance broker (R. 235, 297). His reputation as a citizen of good character was excellent (R. 235, 238, 240, 295, 298). He had no previous criminal record (R. 353). Patrick Burke, a deputy

sheriff for King County saw the defendant, Stepich, January 18, 1952, siting at the bar, and renewed an old service acquaintanceship with him (R. 154). Harold E. Daggett, investigator for the Alcohol-Tobacco Tax Division of the Treasury Department, testified that on May 6, 1952, the defendant, Stepich, accompanied by Charlotte Fulford, permitted him to enter the premises (R. 185), and that during the early morning hours of the following day he sold him a roll of dimes to play the slot machines (R. 170, 175, 186). That upon checking of records he found that the defendant, Stepich, was president of the White Center Athletic Club in 1948 (R. 176).

4. With reference to the defendant, Hopkins, who did not take the stand, the testimony shows: That he operates a fish market (R. 241) and that his reputation for character and citizenship is very good (R. 238, 241, 243, 244, 332, 335). He has no previous criminal record (R. 353). On March 29, 1952, the defendant, Hopkins, verified an answer of the White Center Athletic Club as Secretary-Treasurer thereof (R. 59, 106; Pl's Ex. 1). During January, 1952, a member of an Orthopedic Guild wishing to arrange a dinner-dance at the White Center Athletic Club contacted the defendant, Hopkins, at the club premises and made arrangements for the dinner-dance. This person was advised by him that the members of the Guild could purchase drinks at the club. The dinner was held on February 29, 1952, on the club premises (R. 111, 112, 114). On February 4, 1952, this defendant was seen on the premises in the check room (R. 155). On that occasion, a film was being shown and the premises were being used by the local

Lions Club (R. 135) which had brought its own liquor and was having a stag party. One of the Washington State Liquor Inspectors testified that this defendant was tending the door on that evening (R. 131). The witness, Charlotte Fulford, testified that Hopkins was not employed by the club and never exercised any act of managership (R. 307). The defendants, Felton and DePierris, who worked as bartenders at the club at various times during the period from October, 1951, to May, 1952, likewise testified that their only contact with this defendant was as a club patron (R. 254, 268, 269, 279) particularly as a member of the Lions Club.

5. With reference to the defendant, Russell W. Felton, the testimony shows: He testified in his own behalf (R. 245-275). By occupation he is a bartender and had known the defendant, Desimone, since 1935 (R. 245). During June, 1951, Desimone asked him to work at the White Center Athletic Club. He was paid union scale wages and worked steadily until December, 1951, and thereafter occasionally at the club (R. 248-250). During May, 1952, he was fired by the defendant, Desimone (R. 251). He testified that to his knowledge the defendants, Hopkins and Stepich had no business connection whatsoever with the club (R. 252-254). He further testified that he had no agreement with anyone concerning the affairs of the club except that he had an agreement with the defendant, Desimone, to work there as a bartender (R. 256, 257). During 1951, he earned approximately $1,000.00 while working at the club, and during 1952 he earned approximately $100.00 (R. 272, 273). While working at the club, this defendant sold liquor by the drink in violation of the Steele Act for

which he was convicted on several occasions in Justice Court (R. 354). He testified that he was unaware of the necessity of the club having to obtain a Federal Retailer's Liquor Stamp (R. 255). He admitted that in October, 1951, during one of the raids conducted by the Washington State Liquor Board the subject matter of such a stamp had been mentioned (R. 125, 255). His lack of knowledge in this respect is fully corroborated by the testimony of the liquor inspector relating his conversation with this defendant concerning the FRLD Stamp (R. 125).

6. With reference to the defendant, Bert DePierris, the testimony presented at the trial shows the following: He testified in his own behalf (R. 275-292). He came to Seattle during December, 1951, and was employed by the defendant, Desimone, at the club as a part-time bartender from December, 1951, to May, 1952 (R. 276-277). During the period of his employment, he was paid union wages and earned approximately $800.00 while working for the defendant, Desimone (R. 277, 276). He had known the defendant, Desimone, before the war while he had been working for a beer distributing firm (R. 278). He stated that he knew the defendants, Hopkins and Stepich, only as customers of the club, that he had no agreement with them concerning Federal Liquor Retailer's Stamp, and that he had no agreement concerning that stamp with the defendant, Desimone, or Charlotte Fulford or the defendant, Stepich (R. 280-282).

With the exception of the defendant, Desimone, he had not known any of the other defendants or the witness, Charlote Fulford, before starting to work at the

club (R. 279). He had no financial interest in the club whatsoever and didn't know any of the officers or directors thereof (R. 281). While working at the club, he sold liquor by the drink in violation of the Steele Act and was convicted in Justice Court for these Violations (R. 283). He admitted that the matter of the Federal Liquor Retailer's Stamp was called to his attention by Washington State Liquor Enforcement Officers (R. 130, 139, 146, 286, 287) during January, 1952.

In addition to the testimonial evidence previously reviewed with reference to the defendants, Stepich and Hopkins, the trial court over objection admitted Pl.'s Exs. 2, 4 and 5 consisting of Application for Certificate of Registration of White Center Athletic Club purported to be signed by John Stepich as President and dated November, 1951, and excise tax returns of the club for September, 1951, to February, 1952, purported to be signed by Harold E. Hopkins as Secretary (Pl.'s Ex. 2). This exhibit was offered by the Government for the purpose of showing the address of the operation of the club, the date of such operation, *and the signature of the club officer and his position with the club* (R. 63). The witness identifying the records admitted that he was merely a field agent for the Washington State Tax Commission (R. 60) that he was not the custodian of the excise tax records (R. 64, 65) and that he could not identify the signatures on the Exhibit (R. 65, 69) or state whether the reports were genuine reports (R. 70). The defendants objected to the admissibility of Pl.'s Exhibit 2 on the ground of lack of proper foundation (R. 65) and later moved to strike the exhibit on the ground of in-

competency by reason of failure to have signatures identified and failure to establish authority of the purported officers for signing the reports (R. 190-193). The trial court denied the motion (R. 194). Defendants renewed their motion to strike this exhibit on the same grounds at the conclusion of the trial (R. 336).

Plaintiff's Exhibit 4, was introduced through the Chief of the Returns Processing Branch of the Internal Revenue Service, the official custodian of the records. The Exhibit consists of a reconciliation statement form W-3, the employer's quarterly tax return for quarter ending September, 1951, and an explanation for delinquency and employer's quarterly tax return for quarter ending December, 1951 (R. 80). The forms relate to the club and were the official records of the Department. They purport to be signed by one John Stepich and Harold Hopkins, respectively (R 81).

Exhibit 5, is a special tax return of the club relating to a coin-operated gaming device stamp for period from July 1, 1951, to June, 1952 (R. 82), purporting to contain the signature of Peter Desimone as Vice-President and Manager of the club.

The government witness admitted that he was not familiar with the signatures of the parties found on either Exhibits 4 or 5 (R. 85). At the conclusion of the government's case, the defendants moved to have Exhibits 4 and 5 striken on the ground of incompetency because the government had failed to establish authority of anyone to execute the documents, and on ground of failure of proof establishing that the defendants named actually signed the exhibits (R. 196, 198, 199, 207). The

government sought to justify admission of these exhibits by relying on Federal Criminal Rule 27 and Title 28 U.S.C. Sections 1732 and 1733. The court reserved ruling on Exhibit 4 and denied defendants' motion with reference to Exhibit 5 (R. 206, 209, 222). Exception to the ruling was taken (R. 209). At the conclusion of the trial, these motions were renewed by defendants and again denied (R. 336, 337).

SPECIFICATION OF ERRORS

1. The trial court erred in failing to dismiss the indictment on defendants' motion to dismiss and for acquittal predicated on the ground that the indictment is uncertain, ambiguous and charges a non-existing crime (R. 11, 12, 13, 48-54, 336).

2. The trial court erred in admitting over objection Plaintiff's Exhibits 2, 4 and 5 and erred in failing to grant the defendants' motion to strike these exhibits. The exhibits consist of Washington State and federal tax returns. They were introduced to prove that the defendants, Desimone, Stepich and Hopkins, during the period from June 30, 1951 to May 8, 1952 were officers of the White Center Athletic Club, Inc., a corporation. Defendants objected to the admission of Plaintiff's Exhibit 2 as follows (R. 65):

> "MR. TOULOUSE: I object to the introduction on the ground that there is no foundation to show that these are the records of the State of Washington or that this man has had custody of these records since the period of time involved, that is since some time in 1951 and some time in 1952 or that they are in fact the reports of the White Center Athletic Club,

or for that matter, that they are relevant or material to any issue framed by this indictment."

Defendants' moton to strike Plaintiff's Exhibit 2 was made as follows (R. 190, 191):

"Mr. Toulouse: The defendants likewise move to strike Plaintiff's Exhibit 2 on the ground that it is incompetent, irrelevant and immaterial and, furthermore, that as to the defendants DePierris, Felton, Desimone and Hopkins, that the same is hearsay.

"Defendant—rather, Plaintiff's Exhibit 2 is incompetent for the reason that it establishes nothing. It establishes that an application for a certificate of registration was made by a corporation purporting to be the White Center Athletic Club. It is purportedly signed by John F. Stepich. There is no evidence in the record to identify the John F. Stepich therein referred to as the John F. Stepich before this Court as a defendant. There is no evidence to support the proposition that John F. Stepich, that this is his signature. There is no evidence that the White Center Athletic Club authorized Mr. John F. Stepich to make the application. There is no evidence that John F. Stepich signed as president of the White Center Athletic Club or was in any way connected. On the face of the exhibit, it says 'President'—you don't know of what. The date of the exhibit? It doesn't show the date that it was made."

The motion to strike succeeding pages of the exhibit purporting to show the signature of the defendant, Desimone (R. 191, 192) and Harold Hopkins (R. 193) was predicated upon identical grounds. At the conclusion of the trial, defendants renewed their motion to

strike Plaintiff's Exhibits 2, 4 and 5 as follows (R. 336, 337):

> "I would like, also, for the sake of the record, to renew the defendants' motion to strike the following exhibits * * * Plaintiff's Exhibit 2 and each and every component sheet thereof, Plaintiff's Exhibit 4 and each and every component sheet thereof, and Plaintiff's Exhibit 5 and each and every component sheet thereof, each of said exhibits and the several component sheets of the exhibit bearing a signature of an individual defendant in this case, as to which signature and the making of the signature there has been no proof of the making thereof, no identification from any witness who has identified the signatures or the documents, and for the further ground and the further reason that Title 28 of the U. S. Code, §1733, does not permit the introduction of said exhibits."

With reference to Plaintiff's Exhibit 4, defendants moved to strike the same on the following grounds (R. 196):

> "Mr. Toulouse: I likewise move to strike Plaintiff's Exhibit 4, which appears to be a W-2 return for the year 1951, the first page thereof, having some typing on it and not signed by anyone. The date is not quite legible, but it appears to be January 31, 1952, on the ground that it is a self-serving declaration of somebody. There is no evidence to establish that any one of these defendants was connected with, made, or knew of the making or authorized the making of the first page, and so, therefore, it is absolutely incompetent."

With reference to the subsequent pages of Plaintiff's Exhibit 4, defendants objected as follows (R. 198, 199):

> " * * * I object to that on the ground there is no

evidence in this record, particularly from the testimony of Mr Burdick himself to show other than the fact that one [187] year and a half ago he came to a certain office in the Internal Revenue Department and opened up a jacket known as the White Center Athletic Club jacket, under a certain number, and that he pulled this particular paper out of it. There is no showing that Mr. Stepich signed this or that any one of these defendants signed it. There is no showing that the White Center Athletic Club signed it or authorized any person to sign it on its behalf. Mr. Burdick specifically stated that he didn't know who sent it in, how it was received, who prepared it, or anything else in connection with it other than the fact that he had it, that it was in a jacket.

"Now, the same thing is true with respect to the next page * * *.

"It is item 4 in the exhibit, which apparently is a mimeographed form filled in with dates, reciting October 31, 1951, and saying 'lack of funds at due date. John F. Stepich, Pres.' He doesn't say he is president of what. It doesn't show that this John F. Stepich in this courtroom signed this exhibit or that he had authority to sign it on behalf of any corporation known as the White Center Athletic Club, Inc., [188] or that he had authority from any one of the defendants, that is Felton, DePierris, Desimone or Hopkins, to sign it, or that he had authority from any officer, director or stockholder of the Athletic Club."

The motion to strike was renewed at the conclusion of the trial (R. 336, quoted *supra*).

With reference to Plaintiff's Exhibit 5, appellants

at the conclusion of the government's case moved to strike the same (R. 206, 207):

> "Mr. Toulouse: Yes, your Honor. The defendants move that Plaintiff's Exhibit 5 be stricken on the ground that it is incompetent * * *.
>
> " * * * There is no showing in the evidence that Mr. Desimone made this return, signed this [198] return, or that any of the defendants DePierris, Felton, Stepich or Hopkins authorized him to sign the return, that it was done with their knowledge, with their permission, or in their presence, or that it was done by the White Center Athletic Club, or that Mr. Desimone had any connection with the White Center Athletic Club as an officer, director, or stockholder, or that this signature appearing thereon is that of the Mr. Desimone who is a defendant in this case, or that this document was transmitted—first, who was it prepared by? There is no evidence as to who prepared it. Secondly, there is no evidence who sent it. Thirdly, there is no evidence who signed it. Fourthly, there is no evidence who put it in the jacket. Fifthly, it is only evidence, if at all, of the fact that the Government had in its jacket three pieces of paper marked Plaintiff's Exhibit 5."

At the conclusion of the trial, this motion was renewed (R. 336, quoted *supra*).

3. The trial court erred in failing to grant defendants' motion to dismiss the indictment and in failing to grant defendants' motion for acquittal on the ground that the evidence failed to prove the crime charged (R. 222, 337).

4. The trial court committed error by entering Special Findings of Fact I (R. 20) because that purported

Special Findings of Fact states a conclusion of law and is not a finding of fact. The trial court further erred in failing to make a Special Finding of Fact establishing an agreement between any of the defendants to violate Title 26, Section 1753, U.S.C., and in failing to find specially who the original parties to such an agreement were, which of the defendants entered into the original agreement and on which approximate date any of the defendants joined the conspiracy, subsequently. The trial court erred in failing to comply with defendants' request for Special Findings of Fact (R. 14-19).

5. The trial court erred in entering Special Findings of Fact III (1), (2), (3), and (4), and in entering Special Findings of Fact IV (1), (2), (5) and (11) (R. 20-25) on the ground that said findings of purported overt acts are not substantiated by the evidence.

ARGUMENT

Point 1. The evidence does not prove beyond a reasonable doubt that the Defendants agreed to violate Title 26, Section 3253, U.S.C. and there is no evidence of a specific design, plan or purpose on the part of the Defendants to violate Section 3253.

It is clear that a conspiracy necessitates the existence of an agreement with a single design for the accomplishment of a common purpose and the joinder of the accused to further the purpose of the agreement.

The evidence previously outlined in this case, appellants submit, might be sufficient to establish the existence of a conspiracy between some of the defendants to violate the Washington State Liquor Act. Appellants are convinced that the testimony is insufficient to show

the existence of an agreement between the defendants to fail to pay *the* $50.00 *federal occupation tax* required by Title 26, Section 3253, U.S.C., for the period covered by the indictment.

Appellants challenge the respondent to show to this court by as much as a scintilla of evidence that the defendants, Hopkins and Stepich, had any knowledge of the existence of such a tax. The record shows that these defendants are businessmen engaged in the fish and insurance business, respectively (R. 236, 241, 243, 294, 296); that their reputation in the community is excellent (R. 236, 238, 239, 241, 243, 298, 333); and that they are generally well liked and highly regarded (R. 357, 359). The witness Charlotte Fulford during the period covered by the indictment was merely hired as office girl, checkroom girl, and cashier to provide coins for patrons of the slot machines belonging to the club. Appellants submit that it is contrary to common experience to infer that the defendant, Desimone, who, according to the undisputed testimony of all the witnesses, owned, managed and operated the White Center Athletic Club (R. 260, 285, 302, 306, 317), would make an agreement with these men and the office girl, who was paid $8.00 per day, not to pay a $50.00 yearly occupation tax.

The defendants, Felton and DePierris, were employed as bartenders at $15.00 per day. Not only is there no evidence in the record to show the existence of an agreement between them and the other defendants to fail to pay the occupation tax, but the government's witnesses definitely stated that neither of these defendants

was aware of the federal requirement. Thus, one government's witness testified that when the premises were raided during October, 1951, he asked the defendant, Felton, about the Federal Liquor Dealer's License (R. 125):

"Q. Did you ask him anything else?

A. I asked him to see the Federal retail liquor dealer's tax stamp.

Q. And what, if anything, did he say then?

A. *He did not know if they had one or, if so, where it was.*"

The government's witness testified that during the raid of January 18, 1952, when asking the defendant, DePierris, about this matter, he received the following response (R. 129, 130):

"Q. What, if anything, did you say to Mr. DePierris at this time and what did he say to you?

A. I inquired to see the retail liquor dealer's Federal tax stamp for the premises.

Q. What did he say, if anything?

A. He didn't know about the stamp, *in fact, didn't know what such document was, and I proceeded to explain to him that it was a Federal tax for selling liquor.* He again told me he wasn't selling liquor; he was only serving liquor for a service charge."

Another government's witness testified as follows (R. 146):

"Mr. Harris: Mr. DePierris.

A. I questioned him regarding an RLD stamp, a retail liquor dealer's stamp, at the club. At his instance, *I explained to him what it was.*

Q. In so many words, what did you say?

A. I told him it was required by the Federal Government for persons who sell liquor at retail.

Q. What did he say? [124]

A. He was noncommittal. *He seemed ignorant of the law.*"

The record shows that the two bartenders previous to their employment by the club had not engaged in selling liquor by the drink (R. 254, 284) and for this reason their ignorance concerning the necessity of a Federal Retail Liquor Stamp is perfectly natural. The evidence submitted renders it even questionable whether the defendant, Desimone, knew that his operation was subject to a federal tax. The government's witness testified as follows (R. 133, 134):

"A. He inquired of Mr. Desimone to see the retail liquor dealer's Federal tax stamp for the premises.

Q. And what did he say, if anything?

A. *That they didn't need one because they weren't selling whiskey; they were just selling service.* * * *

Q. Did you have any further conversation with Mr. Desimone at that time?

A. Yes. We talked about the tax stamp at some length, and I made the rather broad comment to Mr. Desimone that he had been in the game a long time; he should know better than to operate a liquor place without a tax stamp; that he was flirting with the penalty to McNeill Island, and it was more of a joke than anything else, and we laughed it off as such."

It is submitted that it is contrary to common sense to assume that the defendant, Desimone, would want to be

sent to McNeill Island when he could obviate that possibility by merely paying a $50.00 tax. The inherent improbability of knowledge on the part of the defendant, Desimone, likewise is confirmed by the existence of Plaintiff's Exhibits 2, 4 and 5 showing that the White Center Athletic Club filed both state and federal returns necessitating far greater tax payments than the $50.00 involved here.

Lest it be argued by respondent that the defendant, Desimone, must have been perfectly aware of the fact that bottle clubs were illegal in the state of Washington, this court should take judicial notice of the fact that the legal status of such clubs during the period covered by the indictment was in litigation. The legality of the existence of such clubs and the fact that they did not need to be licensed by the State Liquor Board was ultimately established by the decision in the case *Derby Club, et al., v. Becket,* 41 Wn.(2d) 869, 252 P. (2d) 259. The White Center Athletic Club was a party to that action which was brought to enjoin the Washington State Liquor Board from arresting bottle club operators. The decision shows that the bottle clubs were fortified in taking the position that they did not need a license by an opinion of the attorney general of the State of Washington which held that subsequent to the passage of Initiative 171 in 1948 bottle clubs were legal.

An agreement to violate Title 26, Section 3253, U.S.C., apparently was predicated by the trial court upon a mere inference from the fact that the defendants, Desimone, Felton and DePierris, sold liquor by

the drink illegally. Although there is absolutely no evidence in the record proving that the defendants, DePierris and Felton, or the witness, Charlotte Fulford, had any knowledge of the existence of the federal tax and although it is doubtful whether the defendant, Desimone, was aware of its existence, appellants take the position that mere knowledge of the existence of the tax as a matter of law is insufficient to prove an agreement to violate the statute. In this connection the reasoning of the Circuit Court of Appeals for the Eighth Circuit in the case of *Davidson, et al., v. United States,* 61 F.(2d) 250, reversing judgment of conviction as to certain defendants and affirming conviction as to others appears to be particularly cogent with reference to the case at hand (pp. 254, 255):

> " * * * *Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy.* The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement and participation therein, with knowledge of the agreement.
>
> *"Presumption cannot be based upon another presumption but only upon facts.* It is not necessary that all of the alleged conspirators should have been such from the beginning of the conspiracy. There may be a subsequent joining; *but a person, to be held as subsequently joining a conspiracy, must be shown to have had knowledge of the conspiracy at the time of joining, and to have participated while having such knowledge."*

The gist of the offense in the instant case, of course,

consists in a purported specific intent and agreement between the defendants not to pay the federal tax. What possible reason could there exist for an agreement between the defendant, Desimone, the owner, manager and operator of the club, and the two bartenders and the office girl? To pose the question, it is submitted to a reasonable mind immediately demonstrates the inherent absurdity of the inference of any agreement. If the defendant, Desimone, was aware of the tax and intended not to pay it, why would he need an agreement with the bartenders and his office girl to accomplish that purpose?

Assuming for the purpose of argument that Plaintiff's Exhibits 2, 4 and 5 are admissible and that the defendants, Stepich and Hopkins, were officers of the club during the period covered by the indictment, it must be pointed out that their connection with the club management is almost nil as has been previously related in appellants' statement of the case. With reference to the defendant, Hopkins, we have the single occasion of his arranging a dinner party for an orthopedic guild during January, 1951 (R. 109), and with reference to the defendant, Stepich, we have one occasion on May 6, 1952, when he permitted a witness to enter the club and supplied change for the slot machines. As far as the record shows, it is submitted that there is no evidence whatsoever that the defendant, Stepich, even knew of illegal sales of liquor in the club. With reference to the defendant, Hopkins, such knowledge of illegal sales might perhaps be inferred by some stretch of the imagination. We must remember, however, that knowledge of the illegal sale of liquor is not the gist of the offense with

which the defendants are charged. Even if it could be demonstrated from the evidence and we submit that there is not one iota of evidence in the record that the defendants, Hopkins and Stepich, were aware of the federal occupation tax and were aware of the fact that it had not been paid, such knowledge alone would be insufficient to prove the crime charged.

Thus, in the case of *United States v. Falcone, et al.*, 109 F.(2d) 579 affd., 311 US. 205, where a conviction of sellers who supplied vast quantities of sugar, yeast and cans to illicit distillers of alcohol was reversed, Judge Learned Hand, generally regarded by bench and bar as one of the truly great and outstanding American jurists, reasoned (p. 581):

> " * * * but in prosecutions for conspiracy or abetting, *his attitude towards the forbidden undertaking must be more positive.* It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; *he must in some sense promote their venture himself, make it his own, have a stake in its outcome.* The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. *That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.* We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was *toto coelo* different from joining with them in running the stills * * *."

Again, in the case of *United States v. Di Re,* 159 F. (2d) 818, where the government sought to justify an arrest on the basis of the arresting officer having reasonable cause to believe a passenger in an automobile to be guilty of conspiracy to possess counterfeit gas ration coupons in the possession of other occupants of the car, the Honorable Learned Hand writing the majority opinion explained (819):

> " * * * We have several times had occasion to consider what relation to a conspiracy makes a man a confederate, and what relation to the principals in a crime makes a man an abettor; and we have uniformly held that the prosecution must prove the accused to have associated himself with the principals *in the sense that he has a stake in the success of the venture.* When the Supreme Court affirmed us in *United States v. Falcone,* it held that the sale of material to those who the seller knows will use it to commit a crime, does not make the seller a party to a conspiracy of the buyers. We do not understand *that the decision turned upon the fact that the seller might not have been aware that there were several buyers acting in concert;* and, so far as we can see, our doctrine is a corollary of the decision, although the opinion did not expressly go so far. * * * "

Clearly, the economic interest of the defendants, Felton and DePierris, merely earning wages as bartenders, and the economic interest of the witness, Charlotte Fulford, being paid wages of $8.00 a day, is far less than the economic interest of the sellers of sugar, yeast and cans for illicit distilling purposes in the *Falcone* case, *supra.* The bartenders and the office girl, of course, had no interest whatever in the defendant Desimone's fail-

ure to pay the $50.00 federal occupation tax. As to the defendants, Hopkins and Stepich, there is no evidence whatsoever in the record that they had any economic interest in the White Center Athletic Club or benefited from its operation. On this point, the testimony of the probation officer elicited at the time of sentencing at the request of the trial judge deserves to be noted (R. 353):

> "THE COURT: Now, as to the other defendants, did any of them make any money out of this transaction?
>
> MR. STEWART: No, your Honor. *The only two that made any money out of the transactions were the two bartenders who made their salary.*"

Finally, the concluding statement made at the time of sentencing by the United States Assistant District Attorney who tried this case proves appellants' contention (R. 347, 348):

> "MR. HARRIS: Your Honor, I am assuming that we all have a recollection of what transpired at the trial. I would like only to add to that very briefly that from the investigation conducted by the Federal Alcohol Tax unit, which in part was an investigation coupled with the State of Washington Tax Department and Alcohol Tax Department, that the investigation disclosed that *Peter Desimone was the primary and motivating factor in this whole matter; that he was the core, the brain; and that the whole set up all originated and commenced with his undertaking, and with his discontinuance of the matter the whole thing then came to an end;* but that he was the primary and motivating factor; that the defendants Stepich and Hopkins *had knowledge of what was going on* but [4] did not in any way in any degree measure up with what Peter

> Desimone himself actually did. *We believe that he reaped all the profit or most of the profit that was able to be made out there.* That the two defendants, Felton and DePierris, *while they knew what was going on, were in no way,* other than their salary and tips, if any, benefitted by this operation. Their activity in the conspiracy was more or less controlled—or their active participation in it when they were allowed to participate was controlled by Peter Desimone."

The knowledge imputed in the statement quoted to the defendants, Stepich and Hopkins, and the defendants, DePierris and Felton, is at most mere knowledge of illegal sales of liquor by the drink, but there is no evidence whatsoever to prove that at the beginning of the operation in July, 1951, any of them knew of the existence of the federal tax. Nor is there any evidence that they knew that such tax had not been paid. Of course, both bartenders had no connection whatsoever with the club at the commencement of the operation and it is therefore clear that they could not have been the original conspirators. Under the admissible evidence, there are no facts tending to prove that the defendants, Stepich and Hopkins, were connected in any manner with the club at the commencement of the operation. Hence, they could not have been original conspirators. That would leave only the possibility of a conspiracy between the defendant, Desimone, and the witness, Charlotte Fulford, and we have already demonstrated the inherent absurdity of inferring an agreement between her and the defendant, Desimone, to fail to pay the occupation tax. Hence, it is submitted that under the evidence before the trial court the existence

of the necessary agreement rests entirely upon conjecture, surmise, inference pyramided upon inference, and guess without substance in fact, experience or logic. Loose as the rules of evidence may be in the law of conspiracy, it is respectfully submitted that the facts before the court in this case do not rise to the dignity required to establish the crime of conspiracy.

Point 2. The special findings of fact entered by the trial court do not support the judgment and sentence. There is no finding of an existing agreement between any of the alleged conspirators. There is no finding as to when the conspiracy originated nor as to who the original parties to it were. There is no finding when the other Defendants joined the conspiracy nor is there any finding of the existence of the conspiracy to be joined. The trial court erred in failing to make the special findings requested by the Defendants in accordance with Rule 23 (c) of Federal Rules of Criminal Procedure.

Rule 23 (c) of the Federal Rules of Criminal Procedure makes it mandatory upon the trial judge to make a general finding and on request to make special findings (18 U.S.C. Federal Rules of Criminal Procedure 23 (c)):

> " * * * In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially."

Appellants in compliance with the rule submitted a request for special findings of fact (R 14-15) and submitted proposed special findings of fact (R. 16-19). The trial court made the following special finding of fact (R. 20):

> "That during the period commencing June 30, 1951, and ending May 8, 1952, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris did unlawfully conspire to and with one another, and with divers other persons (to-wit, Charolette Fulford) to commit an offense against the United States, to-wit, to wilfully and unlawfully carry on the business of a retail liquor dealer, and in so doing to wilfully fail to pay the tax required by law, contrary to the provisions of Title 26, U.S.C., Sec. 3253."

It is submitted that the finding quoted, states a conclusion of law rather than a finding of fact. This is the only finding relating to the gist of the crime, *i.e.,* "conspiracy." The gist of that crime consists in an agreement to violate a law which must be made at least between two persons and must originate at some time. Patently, there is no finding in this case as to any of these elements. Of course, the failure to make a proper finding must be explained on the basis of the lack of existence of evidentiary facts to support such a necessary finding.

As appears from the commentary of the advisory committee helping in the preparation of the Federal Rules of Criminal Procedure, the requirement of findings in cases tried to the court was adopted from Connecticut practice (see Federal Rules of Criminal Procedure for the District Courts of the United States, West Publishing Co. 1946, pp. 33-37). The rule was de-

signed to follow the practice outlined in the case of *State v. Frost,* 105 Conn. 326, 135 Atl. 446, 448-449:

> " * * * In the criminal case tried to the court, it makes a finding of the facts upon which its conclusions are reached. *Its finding should contain the subordinate facts found and then* the conclusions reached from those subordinate facts. *The method thus far conforms with that of the civil case tried to the court.* * * * "
>
> "It is essential that the conclusions reached by the court should be stated in the finding. *If these be conclusions of fact based upon the subordinate facts, these should be stated.* If these be conclusions of law reached by the court of its own motion, or in passing upon claims of law made by either party, these should be stated. *A conclusion in the finding that the accused had been proved guilty, as charged, beyond a reasonable doubt, could only be tested on appeal by determining whether the subordinate facts fairly supported this conclusion.* * * * "

It is submitted that the trial court should have entered the defendants' proposed special findings (R. 16-19). They show insufficiency of the evidence to prove existence of an agreement to violate the statute involved, insufficiency of the evidence to prove who the original conspirators were, insufficiency of the evidence to prove who of the defendants joined later and at what time, and insufficiency of the evidence that the alleged overt acts were the result of any of the defendants acting in concert.

In the absence of a special finding of necessary subordinate facts, *i.e.,* the existence of an agreement to violate the federal occupational tax statute, the judgment

and sentence of conviction should not be allowed to stand.

Appellants also urge that as to the overt acts found in Finding No. III (1), (2), (3) and (4), and Finding No. IV (1), (2), (5), and (11) (R.21-25), there exists no evidence. Appellants do not wish to belabor this point by reason of the fact that if a conspiracy had been found a single overt act would suffice for conviction.

Point 3. Plaintiff's Exhibits 2, 4 and 5 should not have been admitted because no proper foundation was laid for their admission. The failure of proof showing that the signatures affixed to the documents admitted were those of the Defendants named rendered the exhibits incompetent. Their admission was particularly prejudicial to the Defendants, Stepich and Hopkins, in that these exhibits constitute the only link connecting these Defendants with the White Center Athletic Club at the period specified in the indictment as the date of origin of the conspiracy.

A. No proper foundation was laid for the admission of Exhibit 2 (application for certificate of registration and bi-monthly state excise tax returns filed with the Washington State Tax Commission). There is no evidence identifying the signature contained on the exhibit as being those of any of the appellants.

Plaintiff's Exhibit 2 was introduced not for its contents, but for the specific purpose to show the existence of a connection between the defendants, Desimone, Hopkins and Stepich, with the White Center Athletic Club, to-wit; that they were officers of the club (R. 63). The witness through whom this exhibit was

offered testified that he was the field agent of the Washington State Tax Commission charged with registering mechanical devices (R. 60). He admitted that he was not the custodian of the excise tax reports (R. 64, 65);

> "THE WITNESS: Well, the excise tax returns forms are kept in a separate file, and the slot machine returns are kept in my office. *In other words, I have nothing to do with the excise tax return forms.*
>
> MR. TOULOUSE: In other words, you had nothing to do with those returns right there as far as physical custody of those papers is concerned? You haven't had any custody from the time they were received?
>
> THE WITNESS: *That is right.*"

With reference to the signatures on the exhibit he testified (R. 65, 68-69):

> "MR. TOULOUSE: You don't know whose signature is on there, do you?
>
> THE WITNESS: No."
>
> * * *
>
> "Q. You don't know whether or not that is the signature of John Stepich on that application, do you?
>
> A. That is correct.
>
> Q. You do not know whether it is his signature?
>
> A. *I do not.*"
>
> * * *
>
> "Q. So my statement is still correct, that you don't know whether or not that is Mr. Stepich's signature or whether or not that is Mr. Hopkins' signature, is that correct?
>
> A. That is correct."

This exhibit was admitted not against the White Center Athletic Club, but against third parties, the defendants, Desimone, Hopkins and Stepich. There is no proof that the offering witness was the custodian of these records. There is no proof that they were made by the club in the regular course of business, or that the persons who signed the exhibit were authorized to do so. It follows that this exhibit is not admissible pursuant to Title 28, U.S.C., Section 1732 or pursuant to Rule 44 of Federal Rules of Civil Procedure.

B. Plaintiff's Exhibits 4 and 5 should not have been admitted because the government failed to establish the identity of the purported signatures and failed to establish that the persons signing the exhibits had authority to execute the same.

These exhibits are employer's quarterly tax returns purported to be signed by Harold Hopkins and John F. Stepich, respectively (Plaintiff's Exhibit 4) and special tax returns for coin operated gaming devices purported to be signed by Peter Desimone (Plaintiff's Exhibit 5). The identity of the signatures was not proven and it was not shown that the purported signers had authority to execute the exhibits.

It is submitted that Plaintiff's Exhibits 4 and 5 are not admissible pursuant to Title 28, U.S.C., Section 1732 because they are not "a memorandum or record of any act, transaction, occurence or event" within the ambit of said section. They are likewise not admissible pursuant to Title 28, U.S.C., Section 1733 as government records because as such they are neither material or relevant with reference to the issues before the court.

Nor, were these exhibits rendered admissible pursuant to Rule 44 of the Federal Rules of Civil Procedure. The government witness through whom the exhibits were offered frankly admitted that he did not know the signatures of the persons purported to have signed the exhibits (R. 85):

> " * * * Now, do you know that to be John Stepich's signature?
>
> A. I do not, sir.
>
> Q. You do not?
>
> A. I do not know that to be his actual signature.
>
> Q. And as to the other signatures on the [48] several remaining component parts of Plaintiff's Exhibit 4, do you know those to be the signatures of the parties whose names are there written?
>
> A. I do not, sir.
>
> Q. And is the same thing true with respect to the purported signatures of persons appearing in Plaintiff's Exhibit 5?
>
> A. *I do not, sir.*"

There is no testimony in the record proving that the signatures on the exhibits are those of any of the defendants. There is no independent testimony in the record showing that for the period from July 1, 1951, to March, 1952, the defendants named were officers of the White Center Athletic Club. On the contrary, the witness having checked for the government the corporate records of the club testified that for the years 1951 and 1952 he could find no corporate records of the club (R. 178, 179). It is submitted that Plaintiff's Exhibits 4 and 5 are not competent nor are they material or relevant as far as their contents are concerned for the

purpose of the action. The observation made by the Eighth Circuit Court of Appeals in the case of *Masterson v. Pa. R. Co.,* 182 F.(2d) 793, is pertinent here (p. 797):

> " * * * Obviously a writing is not admissible under the Business Records Acts merely because it may appear upon its face to be a writing made by a physician in the regular course of his practice. It must first be shown that the writing was actually made by or under the direction of the physician at or near the time of his examination of the individual in question and also that it was his custom in the regular course of his professional practice to make such a record * * * ."

The rule recognized by the court in the case of *Levey, et al. v. United States,* 92 F.(2d) 688, demonstrates the inadmissibility of these exhibits (p. 691):

> "Appellant also objected to the introduction in evidence of the records of Wilson-Fairbanks Company and Hachez & Company, and contends that they were inadmissible because they were records of third persons over which none of the defendants had any control. These records were not introduced to show admissions of appellants but to show the almost immediate sale of collateral. In *Wilkes v. United States* (C.C.A.) *supra,* 80 F.(2d) 285, 290, it is said: '*The general rule is that, before the books of a corporation can be received in evidence against a defendant other than the corporation itself, the entries herein must be shown to have been made by persons having knowledge of the facts, and must be corroborated by their testimony, if living and accessible, or by proof of their handwriting, if dead, insane, or beyond the reach of process.*' "

Likewise, the ruling of this court in the case of *Wolcher v. United States,* 200 F.(2d) 493, is applicable (p. 498):

> "The court also admitted in evidence a paper or memorandum obtained by a Government special agent from Wolcher's office files. The paper was dated February, 1936, and was a carbon copy of a purported note sent to the Seattle office of Wolcher's business. It bore the initials 'L. E. W.' and 'E. C.' It contained language to the effect that the writer or writers 'should like to receive a check from you very soon against our private account, so that we can show a similar profit in the coming year and perhaps make considerable more money.' The paper was wholly without foundation; *there was no proof of its genuineness or who wrote it, or that it was a document made in the regular course of business, or otherwise.* Its receipt over appellant's objection was error."

The government having failed to prove the identity of the signatures, it is clear that Plaintiff's Exhibits 2, 4 and 5 are inadmissible. That their admission constitutes prejudicial error is obvious. These exhibits constitute the only evidence in the record showing that the defendants, Desimone, Stepich and Hopkins, were officers of the club during the period the alleged conspiracy must have originated.

Point 4. The indictment is ambiguous and uncertain and not in the language of the statute defining the offense. It charges a non-existing crime and fails to charge properly the crime sought to be defined. For these reasons Defendants' motion to dismiss should have been granted.

The charging portion of the indictment reads (R. 3):

> "That during the period commencing June 30, 1951, and ending May 8, 1952, at Seattle, in the Northern Division of the Western District of Washington, Peter Desimone, John Stepich, Harold Hopkins, Russell W. Felton and Bert DePierris did unlawfully conspire to and with one another, and with divers other persons to the Grand Jury unknown, to commit an offense against the United States, to-wit, *to wilfully and unlawfully carry on the business of a retail liquor dealer, and in so doing to wilfully fail to pay the tax required by law, contrary to the provisions of Title 26, U.S.C., Section 3253;* * * *"

The pertinent portion of Title 26, U.S.C., Section 3253 reads:

> "Any person who shall carry on the business of * * * retail liquor dealer * * * and wilfully fails to pay the special tax as required by law, shall * * * be fined * * * and be imprisoned * * * ."

Clearly, the indictment charges the defendants with conspiracy of *wilfully and unlawfully carrying on the business of retail liquor dealer.* There is no such offense defined by Title 26, U.S.C., Section 3253, it is submitted. The only offense that exists is that of carrying on the business of retail liquor dealer AND wilfully failing to pay the tax. It follows that the information charges a nonexisting crime.

The words "and in so doing" used in the indictment render the indictment ambiguous. If the words relate to the language used immediately preceding them no offense is stated. If these words relate to the wilful failure to pay the tax the indictment must be interpreted as charging in effect a conspiracy to commit a conspiracy.

From the language of the indictment, the defendants could not be sure whether they are charged with a conspiracy to carry on an illegal business or with a conspiracy to wilfully fail to pay a tax. It is submitted that the indictment is uncertain and ambiguous rendering it impossible for the defendants to know against which charge they would have to defend themselves.

CONCLUSION

It having been shown that the evidence fails to prove an agreement between any of the defendants themselves, or any of the defendants and other persons, to wilfully pay the federal occupation tax, it having been shown that the special findings of fact are fatally defective, that the trial court admitted prejudicial incompetent evidence and that the indictment is uncertain and ambiguous and does not charge the crime of conspiracy to violate Title 26, U.S.C., Section 3253 properly, it is submitted that the judgment and sentence of conviction be vacated and the decision of the trial court be reversed.

Respectfully submitted,

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Attorney for Appellants.